

1 KAREN P. HEWITT
2 United States Attorney
3 DOUGLAS KEEHN
4 Assistant U.S. Attorney
5 California State Bar No. 233686
United States Attorney's Office
880 Front Street, Room 6293
San Diego, California 92101-8893
Phone: (619) 557-6549

6 Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

18 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
19 United States Attorney, Karen P. Hewitt, and Assistant U.S. Attorney Douglas Keehn, and hereby
20 files its Response and Opposition to Defendant's Motions to Compel Discovery. This Response
21 and Opposition is based upon the files and records of this case, together with the attached
22 Statement of Facts, Memorandum of Points and Authorities, as well as the Government's Motion
23 for Reciprocal Discovery.

24	/ /
25	/ /
26	/ /
27	/ /
28	/ /

I

STATEMENT OF FACTS

A. Statement of the Case

On July 30, 2008, a federal grand jury handed up a one-count Indictment charging Defendant Elmer Morales with being a Deported Alien Found in the United States in violation of Title 8, United States Code, Section 1326(a) and (b). The Indictment also alleges that Defendant was removed from the United States subsequent to January 29, 1999. Defendant entered a “not guilty” plea before the magistrate court on August 4, 2008.

B. Statement of Facts

1. Defendant's Arrest

On May 29, 2008, at approximately 6:30 a.m., United States Border Patrol Agent (BPA) Samuel Lebron received a Remote Surveillance alert that an individual had just crossed the primary and secondary international border fences at a location approximately three miles east of the San Ysidro Port of Entry and approximately 20 yards north of the international boundary, and that this suspect had run northward toward an area known as “Cisneros.” BPA Lebron knew that “Cisneros” is a point frequently used by aliens illegally entering the United States. Following directions provided by Remote Surveillance, BPA Lebron located the Defendant and questioned Defendant regarding his immigration status. Defiant first claimed he was a citizen of the Republic of Mexico and admitted that he had no legal permission to enter or remain in the United States. At approximately 6:45 a.m. BPA Lebron took Defendant into custody and transported him to the Imperial Beach Border Patrol Station.

At the station Defendant's biometric details were referenced within law enforcement databases. The records checks indicated Defendant is a citizen of El Salvador. When confronted with the discrepancy in his original identifying statement Defendant admitted he is a citizen of El Salvador. Defendant declined to speak with the El Salvadoran Consulate. At approximately 9:10 a.m. BPA Lebron advised Defendant of his Miranda rights and Defendant declined to answer further questions. All questioning ceased at this time.

11

1 **C. Defendant's Criminal and Immigration History**

2 On or about January 29, 1999, Defendant sustained a felony conviction for Aggravated
 3 Robbery in Colorado, for which he was sentenced to 24 years in prison. On or about January 7,
 4 1998, Defendant sustained a felony conviction for two counts of First Degree Criminal Trespass
 5 in Colorado, for which he was sentenced to 18 months in prison. On or about January 12, 2000,
 6 Defendant's probation was revoked and terminated in that matter. An Immigration Judge ordered
 7 Defendant's removal from the United States on April 2, 2007, and Defendant was removed on
 8 September 19, 2007.

9 **II**

10 **MOTIONS TO COMPEL DISCOVERY**

11 The Government has provided Defendant with 46 pages of discovery, the complaint and
 12 statement of facts, reports from the apprehending agents, Defendant's prior conviction documents
 13 and a DVD.

14 With respect to Defendant's discovery motions, the Constitution requires the Government
 15 to preserve evidence "that might be expected to play a significant role in the suspect's defense."
 16 California v. Trombetta, 467 U.S. 479, 488 (1984). To require preservation by the Government,
 17 such evidence must (1) "possess an exculpatory value that was apparent before the evidence was
 18 destroyed," and (2) "be of such a nature that the defendant would be unable to obtain comparable
 19 evidence by other reasonably available means." Id. at 489; see also Cooper v. Calderon, 255 F.3d
 20 1104, 1113-14 (9th Cir. 2001). The Government will make every effort to preserve evidence it
 21 deems to be relevant and material to this case. Any failure to gather and preserve evidence,
 22 however, would not violate due process absent bad faith by the Government that results in actual
 23 prejudice to the Defendant. See Illinois v. Fisher, 540 U.S. 544 (2004) (*per curiam*); Arizona v.
 24 Youngblood, 488 U.S. 51, 57-58 (1988); United States v. Rivera-Relle, 322 F.3d 670 (9th Cir.
 25 2003); Downs v. Hoyt, 232 F.3d 1031, 1037-38 (9th Cir. 2000).

26 **(1) Defendant's Statements**

27 The Government recognizes its obligation under Rules 16(a)(1)(A) and 16(a)(1)(B) to
 28 provide to Defendant the substance of Defendant's oral statements and Defendant's written

1 statements. The Government has produced all of the Defendant's statements that are known to the
 2 undersigned Assistant U.S. Attorney at this date. If the Government discovers additional oral or
 3 written statements that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such
 4 statements will be provided to Defendant.

5 The Government has no objection to the preservation of the handwritten notes taken by any
 6 of the agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents
 7 must preserve original notes of interviews of an accused or prospective government witnesses).

8 However, the Government objects to providing Defendant with a copy of the rough notes
 9 at this time. Rule 16(a)(1)(A) does not require disclosure of the rough notes where the content of
 10 those notes have been accurately reflected in a type-written report. See United States v. Brown,
 11 303 F.3d 582, 590 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule
 12 16(a)(1)(A) does not require disclosure of an agent's notes even where there are "minor
 13 discrepancies" between the notes and a report). The Government is not required to produce rough
 14 notes pursuant to the Jencks Act, because the notes do not constitute "statements" (as defined
 15 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially verbatim narrative of a
 16 witness' assertion, and (2) have been approved or adopted by the witness. United States v.
 17 Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough notes in this case do not constitute
 18 "statements" in accordance with the Jencks Act. See United States v. Ramirez, 954 F.2d 1035,
 19 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where notes were
 20 scattered and all the information contained in the notes was available in other forms). The notes
 21 are not Brady material because the notes do not present any material exculpatory information, or
 22 any evidence favorable to Defendant that is material to guilt or punishment. Brown, 303 F.3d at
 23 595-96 (rough notes were not Brady material because the notes were neither favorable to the
 24 defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71
 25 (3d Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was
 26 insufficient). If, during a future evidentiary hearing, certain rough notes become discoverable
 27 under Rule 16, the Jencks Act, or Brady, the notes in question will be provided to Defendant.

28 //

1 **(2) Defendant's Prior Record**

2 The Government has already provided Defendant with a copy of any criminal record in
3 accordance with Federal Rule of Criminal Procedure 16(a)(1)(D).

4 **(3) Arrest Reports, Notes, Dispatch Tapes**

5 The Government has provided Defendant with all known reports related to Defendant's
6 arrest in this case that are available at this time. The Government will continue to comply with its
7 obligation to provide to Defendant all reports subject to Rule 16. As previously noted, the
8 Government has no objection to the preservation of the agents' handwritten notes, but objects to
9 providing Defendant with a copy of the rough notes at this time because the notes are not subject
10 to disclosure under Rule 16, the Jencks Act, or Brady. The Government is presently unaware nor
11 in possession of dispatch tapes relating to the Defendant's arrest in this case. In addition, the
12 Government has already discovered a copy of the Report of Investigation for Defendant's case.

13 **(4) Documents and Tangible Objects**

14 The Government has complied and will continue to comply with Rule 16(a)(1)(E) in
15 allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy any
16 tangible objects seized that are within its possession, custody, or control, and that are either
17 material to the preparation of Defendant's defense, or are intended for use by the Government as
18 evidence during its case-in-chief at trial, or were obtained from or belong to Defendant. The
19 Government need not, however, produce rebuttal evidence in advance of trial. United States v.
20 Givens, 767 F.2d 574, 584 (9th Cir. 1984).

21 **(5) Reports of Scientific Tests or Examinations**

22 The Government is not aware of any scientific tests or examinations at this time but, if
23 any scientific tests or examinations were conducted or are conducted in the future, the Government
24 will provide Defendant with any reports of any such tests or examinations in accordance with Rule
25 16(a)(1)(F).

26 **(6) Expert Witnesses**

27 The Government will comply with Rule 16(a)(1)(G) and provide Defendant with a written
28 summary of any expert testimony that the Government intends to use under Rules 702, 703, or 705

1 of the Federal Rules of Evidence during its case-in-chief at trial. This summary shall include
 2 expert witnesses' qualifications, expert witnesses' opinions, and the bases and reasons for those
 3 opinions.

4 **(7) Brady Material**

5 The Government has and will continue to perform its duty under Brady to disclose material
 6 exculpatory information or evidence favorable to Defendant when such evidence is material to
 7 guilt or punishment. The Government recognizes that its obligation under Brady covers not only
 8 exculpatory evidence, but also evidence that could be used to impeach witnesses who testify on
 9 behalf of the Government. See Giglio v. United States, 405 U.S. 150, 154 (1972); United States
 10 v. Bagley, 473 U.S. 667, 676-77 (1985). This obligation also extends to evidence that was not
 11 requested by the defense. Bagley, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 107-10
 12 (1976). “Evidence is material, and must be disclosed (pursuant to Brady), ‘if there is a reasonable
 13 probability that, had the evidence been disclosed to the defense, the result of the proceeding would
 14 have been different.’” Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997) (en banc). The final
 15 determination of materiality is based on the “suppressed evidence considered collectively, not item
 16 by item.” Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).

17 Brady does not, however, mandate that the Government open all of its files for discovery.
 18 See United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000)(per curiam). Under Brady, the
 19 Government is not required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence
 20 (see United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002)); (2) evidence available to the
 21 defendant from other sources (see United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995));
 22 (3) evidence that the defendant already possesses (see United States v. Mikaelian, 168 F.3d 380,
 23 389-90 (9th Cir. 1999), amended by 180 F.3d 1091 (9th Cir. 1999)); or (4) evidence that the
 24 undersigned Assistant U.S. Attorney could not reasonably be imputed to have knowledge or
 25 control over. (See United States v. Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001)). Nor does
 26 Brady require the Government “to create exculpatory evidence that does not exist,” United States
 27 v. Sukumolahan, 610 F.2d 685, 687 (9th Cir. 1980), but only requires that the Government “supply
 28

1 a defendant with exculpatory information of which it is aware.” United States v. Flores, 540 F.2d
 2 432, 438 (9th Cir. 1976). 1988) (“No [Brady] violation occurs if the evidence is disclosed to the
 3 defendant at a time when the disclosure remains in value.”). Accordingly, Defendant’s demand
 4 for this information is premature.

5 **(8) Request for Preservation of Evidence**

6 After issuance of a an order from the Court, the Government will preserve all evidence
 7 to which Defendant is entitled to pursuant to the relevant discovery rules. However, the United
 8 States objects to Defendant’s blanket request to preserve all physical evidence. The United States
 9 has complied and will continue to comply with Rule 16(a)(1)(c) in allowing Defendant an
 10 opportunity, upon reasonable notice, to examine, copy and inspect physical evidence which is
 11 within his possession, custody or control of the United States, and which is material to the
 12 preparation of Defendant’s defense or are intended for use by the United States as evidence in
 13 chief at trial, or were obtained from or belong to Defendant, including photographs. The United
 14 States has made the evidence available to Defendant and Defendant’s investigators and will
 15 comply with any request for inspection.

16 **(9) Proposed 404(b) and 609 Evidence**

17 Should the Government seek to introduce any “similar act” evidence pursuant to Federal
 18 Rules of Evidence 404(b) or 609(b), the Government will provide Defendant with notice of its
 19 proposed use of such evidence and information about such bad act at or before the time the
 20 Governments’ trial memorandum is filed. The Government reserves the right to introduce as prior
 21 act evidence any conviction, arrest or prior act that is disclosed to the defense in discovery.

22 **(10) Jencks Act Material**

23 The Jencks Act, 18 U.S.C. § 3500, requires that, after a Government witness has testified
 24 on direct examination, the Government must give the Defendant any “statement” (as defined by
 25 the Jencks Act) in the Government’s possession that was made by the witness relating to the
 26 subject matter to which the witness testified. 18 U.S.C. § 3500(b). A “statement” under the Jencks
 27 Act is (1) a written statement made by the witness and signed or otherwise adopted or approved
 28 by him, (2) a substantially verbatim, contemporaneously recorded transcription of the witness’s

1 oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. § 3500(e). If notes
2 are read back to a witness to see whether or not the government agent correctly understood what
3 the witness was saying, that act constitutes “adoption by the witness” for purposes of the Jencks
4 Act. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United
5 States, 425 U.S. 94, 98 (1976)). While the Government is only required to produce all Jencks Act
6 material after the witness testifies, the Government plans to provide most (if not all) Jencks Act
7 material well in advance of trial to avoid any needless delays.

(11) A-File and (12) Record of Deportation Hearing

The Government will produce documentation regarding any removals and/or proceedings that the Government intends to introduce at trial. Additionally, if so directed by the Court the Government does not object to setting up a viewing of the discoverable portion of Defendant’s A-file at a time that is mutually convenient for the parties. However, the A-file also contains attorney work product and other information that is not discoverable. Moreover, this information is equally available to Defendant through a Freedom of Information Act request. Even if Defendant could not ascertain the A-File through such a request, the A-File is not Rule 16 discoverable information. The A-File contains information that is not discoverable like internal government documents and witness statements. See Fed. R. Crim. P. 16(a)(2). Witness statements would not be subject to production until after the witness for the Government testifies and provided that a “motion” is made by Defendant. See Fed. R. Crim. P. 16(a)(2) and 26.2. Thus, the A-File associated with Defendant need not be disclosed. The Government has produced and will continue to produce documents it intends to use in its case-in-chief. Evidence is material under Brady only if there is a reasonable probability that had it been disclosed to the defense, the result of the proceeding would have been different. See United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001). However, Defendant has not shown how documents in the A-File are material. Finally, Defendant does not own the A-File. It is an agency record. See United States v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997) (noting that A-File documents are admissible as public records).

27	/ /
28	/ /

1 **(13) Residual Request**

2 The Government will comply with all of its discovery obligations, but objects to the broad
3 and unspecified nature of Defendant's "residual" discovery request.

4 **V**

5 **CONCLUSION**

6 For the foregoing reasons, the Government respectfully requests that the Court deny
7 Defendant's motions, except where unopposed, and grant the Government's motions for reciprocal
8 discovery and to compel a fingerprint exemplar.

9 DATED: August 15, 2008

10 Respectfully submitted,

11 KAREN P. HEWITT
12 United States Attorney

13 /s/ *Douglas Keehn*
14 DOUGLAS KEEHN
15 Assistant United States Attorney
16 Attorneys for Plaintiff
17 United States of America

18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,) Criminal Case No. 08CR2525-JM
Plaintiff,)
v.) CERTIFICATE OF SERVICE
ELMER MORALES,)
Defendant.)

IT IS HEREBY CERTIFIED THAT:

I, Douglas Keehn, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **RESPONSE AND OPPOSITION TO THE DEFENDANT'S MOTION TO COMPEL DISCOVERY** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Siri Shetty, Esq.
Attorney for Defendant

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None
the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 15, 2008

/s/ **Douglas Keehn**
DOUGLAS KEEHN